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ALEXANDER L. STEVAS,
CLERK

82-938

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DANIEL T. PAUER, PETITIONER

-vs-

STATE OF OHIO

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO
ELEVENTH DISTRICT

EDWARD T. BRICE
Attorney for Petitioner
109 Court Street
Chardon, Ohio 44024
(216) 285-3179

APPENDIX A-1

Supreme Court Entries Denying Certiorari

THE SUPREME COURT OF THE STATE OF OHIO

1982 TERM

No. 82-818

State of Ohio, Appellee

-vs-

Daniel T. Pauer, Appellant

MOTION FOR LEAVE TO APPEAL FROM
THE COURT OF APPEALS FOR GEAUGA COUNTY

September 15, 1982

THE STATE OF OHIO)
) to wit:
CITY OF COLUMBUS)

It is ordered by the Court that this Motion is overruled.

A true copy.

Attest: Thomas L. Startzman, Clerk of the Supreme Court of Ohio.

THE SUPREME COURT OF THE STATE OF OHIO

1982 TERM

No. 82-818

State of Ohio, Appellee

-vs-

Daniel T. Pauer, Appellant

APPEAL FROM THE COURT OF APPEALS
FOR GEAUGA COUNTY

September 15, 1982

THE STATE OF OHIO)
) To wit:
CITY OF COLUMBUS)

This cause, here on appeal as of right from the Court of Appeals for Geauga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Geauga County for entry.

A true copy.

Attest: Thomas L. Startzman, Clerk of the Supreme Court of Ohio

APPENDIX A-2

O.R.C. Section 2925.03

(Aggravated trafficking in drugs; trafficking in marijuana)

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceeding the bulk

amount but in an amount less than three times that amount;

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violating division (A)(3) of this section.

(B) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(C) If the drug involved is a compound, mixture, preparation, or substance included in schedule I with the exception of marihuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(2) Where the offender has violated division (A)(2) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(3) Where the offender has violated division (A)(3) of this section, aggravated trafficking is a felony of the second degree and the Court shall impose

a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years.

(4) Where the offender has violated division (A)(4) of this section, aggravated trafficking is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(5) Where the offender has violated division (A)(5) or (A)(6) of this section, aggravated trafficking is a felony of the second degree and the court

shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree, and the court shall impose a sentence of actual incarceration of five years.

(6) Where the offender has violated division (A)(7) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarcaration of at least seven years.

(7) Where the offender has violated division (A)(8) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of

seven years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of ten years.

(D) If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates this section is guilty of trafficking in drugs.

(1) Where the offender has violated devision (A)(1) or (A)(2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree.

(2) Where the offender has violated division (A)(3) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug

abuse defense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(3) Where the offender has violated division (A)(4) of this section, trafficking in drugs is a felony of the fourth degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months.

(4) Where the offender has violated division (A)(5) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony abuse offense, trafficking in drugs is a felony

of the second degree and the court shall impose a sentence of actual incarceration of two years.

(5) Where the offender has violated division (A)(6) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(6) Where the offender has violated division (A)(7) of this section, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the first degree and the

court shall impose a sentence of actual incarceration of four years.

(7) Where the offender has violated division (A)(8) of this section, trafficking in drugs is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of seven years.

(E) If the drug involved is marihuana, whoever violates this section is guilty of trafficking in marihuana.

(1) Where the offender has violated division (A)(1), (A)(2), (A)(3), or (A)(4) of this section, trafficking in marihuana is a felony of the fourth degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the third degree.

(2) Where the offender has violated division (A)(5) or (A)(6) of this section, trafficking in marihuana is a felony of the third degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the second degree.

(3) Where the offender has violated division (A)(7) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, the Court shall impose a sentence of actual incarceration of one year.

(4) Where the offender has violated division (A)(8) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of one year, and if the offender has pre-

viously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of two years.

(5) If the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor for the first offense and a misdemeanor of the third degree for any subsequent offense.

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a controlled substance or for cultivating marihuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use.

(G) When a person is charged with possessing

a bulk amount or a multiple thereof, the jury, or the court trying the accused shall determine that amount of the controlled substance involved at the time of the offense, and if a guilty verdict is returned shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is a bulk amount or the requisite multiple thereof, or that the amount of the controlled substance involved is less than a bulk amount or the requisite multiple thereof.

APPENDIX A-3

O.R.C. Section 2925.11

(Abuse of drugs)

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to:

(1) manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(2) Any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, where the drug is in the original container in which it was dispensed to such person;

(3) Any person who obtained the controlled substance in accordance with the written order of a member of the patient review board of the Controlled Substance Therapeutic Research Program established by sections 3719.85 to 3719.87 of the Revised Code, if the con-

controlled substance was possessed or used in accordance with the written order and if the controlled substance is in the original container in which it was dispensed to the person, unless the written order specifies that the controlled substance need not be kept in the original container. (Eff. 6-20-80)

(C) Whoever violates this section is guilty of drug abuse:

(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I and II, with the exception of marihuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

(2) If the drug involved is a compound, mixture, preparation, or substance included in schedule III, IV, or V, drug abuse is a misdemeanor of the third degree, and if the offender has pre-

viously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree.

(3) If the drug involved is marihuana, drug abuse is a misdemeanor of the fourth degree, unless the amount of marihuana is less than one hundred grams, the amount of marihuana resin, or extraction or preparation of such resin, is less than five grams, and the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

APPENDIX A-4

Statement attached to Search Warrant

3-8-79 is the date. "I, Danielle Pauer, of my own free will, wish to make the following statement: there is marijuana in my residence in the basement (furnace room and master bedroom). It has been, " I believe it's, "growing there approximately one year. I have witnessed my mother grow these plants from seeds. It grows on a long stalk that varies with the size of the plant. My parents told me it was marijuana and made them smarter. My parents use it. There are approximately fifteen to twenty plants. I brought a sample of the plant in to school."

Signed Danielle Pauer.

APPENDIX A-5

Order Denying Motion to Suppress, etc.

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case Nos.: 79 C 1044 & 79 C 1045

State of Ohio, Plaintiff

-vs-

Daniel T. Pauer & Jean Pauer, Defendants

JUDGMENT

.ed September 18, 1979

JUDGE HANS R. VEIT

These cases came on for hearing this 3rd day of August, 1979, on defendants' motions to suppress, for a bill of particulars, to dismiss the indictment, motion to view the premises and the State's Motion to quash subpoenaes.

After due consideration thereof it is ordered that:

1. Defendants' motions to suppress are overruled. Franks v. Delaware, 438 U.S. 154 (1978). The pertinent parts of the opinion appear at p. 682, 57 L.Ed. as follows:

> "In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false, and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient."

No substantial preliminary showing was made that the affidavit and testimony leading to the issuance of the search warrant contained material false statements knowingly or intentionally made, or made with reckless

disregard for truth. See also State v. Graddy, 55 Ohio St. 2d 132 (1978) p. 134, 135 - footnote number one.

2. The State's motion to quash subpoenaes is granted accordingly.

3. The motion to dismiss the indictment is overruled.

4. The motion to view the premises is overruled.

5. The motions for further bills of particulars are overruled.

Judgment is hereby entered accordingly.

Signed: Hans R. Veit, Judge

cc: John F. Norton, Esq.
James M. Gillette, Esq.
William C. Hofstetter, Esq.

APPENDIX A-6

Court of Appeals Judgment Entry, Opinion

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT
COUNTY OF GEAUGA

COURT OF APPEALS CASE NO. 881

State of Ohio, Plaintiff-Appellee

-vs-

Daniel T. Pauer, Defendant-Appellant

OPINION

Filed April 4, 1982

Before:

Hon. Edwin T. Hofstetter, P.M., Hon. Robert E. Cook J., Hon. Alfred E. Dahling, J., and Robert E. Henderson, J., 5th Appellate District, Sitting by Assignment.

APPEARANCES:

EDWARD T. BRICE, Counsel for Appellant
109 Court Street, Chardon, Ohio 44024

CRAIG ALBERT, PROSECUTOR, Counsel for Appellee, Courthouse Annex, Chardon, Ohio 44024

DAHLING, J.

This is an appeal from a judgment of the Court of Common Pleas, Geauga County, wherein, after a trial by jury, defendant was found guilty of trafficking in marijuana. Defendant was sentenced to two to five years in the Ohio State Penitentiary, which sentence was suspended. He was fined $500.00 and costs.

Defendant's daughter, Danielle Pauer, gave the following written statement to June Gottschling, a social worker at the Geauga County Welfare Department.

> "I, Danielle Pauer, of my own free will wish to make the following statements;
> There is marijuana in my residence in the basement (furnace room) and master bedroom. It has been growing there approximately one year. I have witnessed my mother grow these plants from seed. It grows on a long stalk that varies with the size of the plant. My parents told me it was marijuana and made them smarter.
> My parents use it. There are approximately fifteen to twenty plants.
> I brought a sample of the plant into school."

Apparently this written statement was the result of a classroom discussion about marijuana and drugs in school. A search

warrant was issued. Plants were seized and confirmed they were marijuana.

The defendant has presented the following Assignments of Error for review:

> I. The Trial Court erred to the prejudice of defendant in overruling defendant's Motion to Dismiss the indictment on the grounds that the conduct criminally proscribed in the statute under which the defendant was charged was so vague, ambiguous and uncertain as to be unconstitutional.
>
> II. The Trial Court erred to the prejudice of defendant-appellant when it overruled defendant-appellant's motion to suppress and granted state-appellee's motion to quash subpenas.
>
> III. The Trial Court erred to the prejudice of Defendant-Appellant when it overruled Defendant-Appellant's Motion for Continuance of the jury trial date due to the State-Appellee's last minute, substantial supplemental discovery to defendant-appellant.
>
> IV. The Trial Court erred to the prejudice of Defendant-Appellant when it permitted State-Appellee's expert to testify, over objection, to matters irrelevant to the elements of the crime charged, which matters were prejudicial to Defendant-Appellant.
>
> V. The Trial Court erred to the prejudice of the Defendant-Appellant when it overruled Defendant-Appellant's Motion to dismiss the charges or acquit the Defendant-Appellant at the close of the State's case.

VI. The Trial Court erred to the prejudice of Defendant-Appellant in overruling his request for the jury instruction regarding affirmative defense and personal use.

VII. The Trial Court erred to the prejudice of Defendant-Appellant in overruling Defendant-Appellant's Motion for New Trial, particularly on the grounds of juror misconduct, and the "New Evidence" from Defendant-Appellant's Wife's subsequent trial.

VIII. The Trial Court erred to the prejudice of Defendant-Appellant in not sustaining Defendant-Appellant's objection to the Prosecutor's remark in closing argument referring to Defendant-Appellant pulling a gun in a separate incident.

IX. At the close of the trial, the Trial Court erred to the prejudice of Defendant-Appellant in permitting the State to amend the charge to include the crime and elements of complicity.

X. The Trial Court erred to the prejudice of Defendant-Appellant in refusing to re-read affirmative defense when jury requested the Trial Court to re-read charges during its deliberations.

XI. The cumulative effect of the errors in Defendant-Appellant's trial amounted to prejudice to Defendant-Appellant requiring a reversal.

These Assignments of Error are without merit.

ASSIGNMENT OF ERROR I

Defendant argues the statute is vague, and

that possibly he should have been charged with a misdemeanor. Also, he argues the wife was growing and he was smoking. Unfortunately, defendant's argument is more vague than the statute.

ASSIGNMENT OF ERROR II

Defendant attacks the reliability of his daughter, Danielle, as an informant. Danielle discussed the matter at school, promised to go home and get a plant sample, went home and returned the next day with a marijuana leaf. This was good evidence to base the search on in consideration of Danielle's reliability in an earlier matter. Defendant argues maybe Danielle got the leaf at another person's home. This is not persuasive.

ASSIGNMENT OF ERROR NO. III

Here, Defendant argues the prosecutor sand-bagged him at the last moment before trial by adding to the list of State witnesses. However, he has not shown how this list, in fact, prejudiced him. He suggests the State may have witnesses who could prove

drug sales but this never came to pass.

ASSIGNMENT OF ERROR NO. IV.

Defendant argues it was error for the witness to testify to the size the seedlings would grow to when they mature. This case was tried in Geauga County, a farm community. We are sure farmers know that seedlings become large marijuana plants. As defendant argues, marijuana is no longer a subject of which the general public is not informed. The testimony merely reinforced what the jurors already knew.

ASSIGNMENT OF ERROR NO. V.

Defendant again argues the wife grew and the husband only smoked. Unfortunately, the plants were in a common area, the basement and the master bedroom, on nicely arranged masonry blocks with artificial light provided.

ASSIGNMENT OF ERROR NO. VI.

This Assignment is without merit. The constitutionality of R.C. 2925.03 has already been discussed. The trial court specifically

mentioned cultivating for personal use in his instructions to the jury.

ASSIGNMENT OF ERROR NO. VII.

This Assignment of Error is well argued by the appellee as follows:

> "It is well established that evidence of juror misconduct in a motiom for a new trial cannot be established initially by the affidavits of the jurors. Rather, evidence aliunde must first be offered before the affidavits or testimony of the jurors will be taken. Goins v. State, 46 O.S. 457, 21 N.E. 476; Emmert v. State, 127 O.S. 235, 187 N.E. 862.
>
> In the case at bar, the defense provided evidence of alleged juror misconduct on the part of the foreman, Mr. Kolsom, and subsequently supplemented that evidence with an affidavit. Based upon this evidence aliunde, the trial court allowed two of the jurors to testify concerning statements made by the foreman and what effect, if any, the statements had upon their determination of the appellant's guilt.
>
> It must be emphasized that both of these jurors testified that the statements of Mr. Kolsom did not influence or affect their vote. Juror Keim stated upon cross-examination that he would have voted guilty even without any statements having been made by Mr. Kolsom (Tr. T. p. 35-37) and again reiterated his same statement upon defense redirect examination. (Tr. T. p. 42) Juror Datsko was emphatic that Mr. Kolsom's statement had no influence or effect upon her vote of guilty.
>
> The trial court heard and evaluated

the evidence and testimony submitted during the motion for a new trial. The foreman, Mr. Kolsom, was truthful when he stated he was retired but was not completely truthful since he had other income from his retail business. It is undoubtedly true, as the court pointed out, that the comments of the foreman did mislead counsel. However, the comments did not affect the vote of two jurors who testified at the motion for new trial hearing. There is no evidence which was presented which would show that the comments of Mr. Kolsom influenced other jurors or that Mr. Kolsom failed to decide the case upon the evidence submitted to the jury and the law as instructed by the court. There was no material prejudice to the rights of the accused. The court properly overruled the defense motion for a new trial."

ASSIGNMENT OF ERROR NO. VIII

Defendant objects to a State witness answering on cross-examination that defendant pointed a gun at him. Defendant asked the question and did not complain, at the time, to the answer. His complaint is without merit.

ASSIGNMENT OF ERROR NO. IX

This Assignment is also without merit. R.C. 2923.03(F) has been construed to hold that a party charged as a principal may be

found guilty of complicity. State v. Strub (1975), 48 Ohio App. 2d 57, 355 N.E. 2d 819. Similarly, State v. Duering (1971), 25 Ohio App. 2d 103, held that a claim of aiding and abetting may be brought out at trial.

ASSIGNMENT OF ERROR NO. X

This assignment is also without merit. To agree with appellant's reasoning would require the court to re-read his entire instructions. Although the affirmative defense is intricately interrelated with the trafficking offense, as discussed earlier, there is not compelling reason for the court to re-read more than the jury requested.

ASSIGNMENT OF ERROR NO. XI

We have considered this Assignment of Error and find it is without merit. The fact is this case is simply about a family that was growing a lot of marijuana plants and the young daughter told about it in school. How can the defendant argue he is not guilty when the plants are lining the wall of his bedroom.

Judgment affirmed.

Signed: Alfred E. Dahling, Judge

HENDERSON, J., concurs
5th District, Sitting by assignment

and

COOK, J., Concurs in judgment only.

JUDGMENT ENTRY

STATE OF OHIO)
) SS:
COUNTY OF GEAUGA)

This cause came on to be heard upon the Record in the Trial Court, and was briefed and argued by counsel for the parties.

Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each Assignment of Error was reviewed by the Court and disposed of as set forth in this Court's OPINION, which is incorporated herein by reference.

It is ordered that the costs shall be taxed against the appellant.

This Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Trial Court to carry this judgment into execution. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

COOK, J., Concurs in judgment only.

Signed: Judge Alfred E. Dahling, For The Court

HENDERSON, J., 5th Appellate District, Sitting by Assignment

and

COOK, J., Concur

APPENDIX A-7

Judgment Entry Conviction Entry

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1044

State of Ohio, Plaintiff

-vs-

Daniel T. Pauer, Defendant

JUDGMENT ENTRY

September, 1979

JUDGE HANS R. VEIT

On the 24th day of September, 1979, personally came the defendant into court with his counsel, William Hofstetter, and the State of Ohio was represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys, and this cause proceeded to trial. Thereupon came

the following persons who were duly impaneled and sworn as jurors, to wit:

LENORE ANNE CRITZER	ALICE M. MEDINA
RUTH M. DATSKO	JOHN S. KESSINGER
ALLEN H. NELLS	DORANELL G. KOLLER
DOUGLAS KRIVOY	HELEN C. FINK
ROY J. KEIM	WILLIAM M. CONNETT
HARRY R. KOLSOM	MARGARET L. WATKINS

MARTHA B. WEBSTER, Alternate

Whereupon opening statements were made by both the State of Ohio and the defendant and the State of Ohio produced evidence. Court then recessed until September 25, 1979, at 9:00 A.M.

On this 25th day of September, 1979, court reconvened at 9:00 A.M., with the defendant being personally present with his counsel, William Hofstetter , and the State represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys.

The State of Ohio produced further evidence and rested. the defendant produced evidence and rested.

Final arguments by both the State of Ohio and the defendant were then heard and the Court instructed the jury as to the applicable law. The jury then retired for deliberation in the custody of the Bailiff who was first duly sworn according to law.

Thereafter, on September 25, 1979, the said Jury returned to open court in the custody of the Bailiff and the said defendant and his counsel being present in court, the said Jury returned their verdict signed by all twelve jurors finding the defendant GUILTY of a Violation of § 2925.03(A)(3) of the Ohio Revised Code, Trafficking in Marijuana and being a Fourth Degree felony.

Whereupon the jury was discharged and the court ordered a presentence investigation report pending sentence.

Bond previously set in this matter was ordered continued.

Signed: HANS R. VEIT, JUDGE

Approved: Richard J. Makowski,
Assistant Prosecuting Attorney

JUDGMENT ENTRY

January, 1980

This matter came on for sentencing on the 8th day of January, 1980, the defendant being present in court with his counsel, William Hofstetter, the State of Ohio being represented by Richard J. Makowski, Assistant Prosecuting Attorney.

The court, after reviewing the presentence investigation report and upon due consideration of all facts presented, sentenced the defendant to the Ohio Correctional Medical and Reception Center at Columbus, Ohio, for a period of not less than two nor more than five years for a violation of § 2925.03(A)(3) of the Ohio Revised Code, Trafficking in Marijuana and imposed a fine of $500.00.

The court then suspended the aforementioned sentence and placed the defendant

on probation for a period of two years under the terms of probation as determined by the Geauga County Common Pleas Court.

Said fine is to be paid within 90 days of this hearing and the costs of this action are to be paid within 30 days of said hearing date.

The court further instructed the defendant of his right to appeal, to obtain counsel, and to have the costs of appeal and documents paid if he is unable to pay.

Signed: HANS R. VEIT, JUDGE

Approved: Richard J. Makowski,
Assistant Prosecuting Attorney

APPENDIX A-8

Jean Pauer's Judgment Entry

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1045

State of Ohio, Plaintiff

-vs-

Jean Pauer, Defendant

JUDGMENT ENTRY

Filed: October 5, 1979

JUDGE HANS R. VEIT

On the 27th day of September, 1979, personally came the defendant into court with her counsel, James M. Gillette, and the State of Ohio was represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys, and this cause proceeded to trial. Thereupon came

the following names persons who were duly impaneled and sworn as jurors, to wit:

ROBERT WALLACE CUSTER	IRENE M. GORTON
DENNIS KING	ELAINE MARIE CHAPMAN
MARGARET A. TURK	BERNICE E. SCHRADER
MYRA PFAU GORDON	ANNABELLE HOLEC
MARIAN R. BIACOFSKY	RICHARD P. WALLIS, JR.
CHARLOTTE A. BECK	ALBIN A. MUREN

JUNE M. LAMPL, Alternate

Whereupon opening statements were made by both the State of Ohio and the defendant and the State of Ohio produced evidence. Court then recessed until September 28, 1979, at 9:00 A.M.

On this 28th day of September, 1979, court reconvened at 9:00 A.M., with her counsel, James M. Gillette and the State of Ohio represented by Richard J. Makowski and Egidijus Marcinkevicius, Assistant Prosecuting Attorneys.

The State of Ohio produced further evidence and rested. The defendant produced evidence and rested.

Final arguments by both the State of

Ohio and the defendant were then heard and the Court instructed the jury as to the applicable law. The jury then retired for deliberation in the custody of the Bailiff who was first duly sworn according to law.

Thereafter, on the 28th day of September, 1979, the said Jury returned to open Court in the custody of the Bailiff and the said defendant and her counsel being present in Court, the said Jury returned their verdict signed by all twelve jurors finding the defendant GUILTY of a violation of Section 2925.11 of the Ohio Revised Code, drug abuse, a minor misdemeanor.

Whereupon the jury was discharged and the Court sentenced the defendant to pay a One Hundred ($100.00) Dollar fine and court costs. Said fine is to be paid within one week of the date of this hearing and the Court costs are to be paid within thirty days of the date of said hearing.

IT IS SO ORDERED.

Signed: HANS R. VEIT, JUDGE
Approved: Richard J. Makowski,
Assistant Prosecuting Attorney

APPENDIX A-9

Jury Misconduct Transcript excerpt

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1044

State of Ohio, Plaintiff

-vs-

Daniel T. Pauer, Defendant

TRANSCRIPT OF PROCEEDINGS

November 1, 1979

JUDGE HANS R. VEIT

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made during the deliberations, did Mr. Kolsom say anything that indicated a prior knowledge of Daniel Pauer?

MR. MAKOWSKI: Objection.

THE COURT: You have to rephrase that. Prior to what?

Q. Knowledge of Daniel Pauer prior to the trial?

MR. MAKOWSKI: Objection, Your Honor. This is absolutely hearsay.

THE COURT: It's overruled.

MR. HOFSTETTER: Your Honor, Mr. Makowski has noted his continuing objection.

THE COURT: It's overruled.

Q. Please answer.

A. Yes, he did. He made the statement that--he says, "Don't be mislead by this man." He said, "I know something about this man." He says --

Q. Did he elaborate on that at all? Did he say what he knew?

A. Yes. He made the comment that this was how Mr. Pauer makes his living.

Q. By this do you know what he was referring to?

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Q. Mr. Keim, did Mr. Kolsom say anything else which surprised you in any way and,

specifically, adverse to Mr. Pauer?

A. He did say that if we didn't find Mr. Pauer guilty he would probably sue the Chester Township Police Department.

Q. Did Mr. Kolsom indicate how he know these things?

A. No.

Q. Do you know Mr. Kolsom personally, Mr. Keim?

A. No.

Q. Did Mr. Kolsom discuss his employment at all in the jury room, do you recollect?

A. No, I don't know what he does.

Q. What, if any, impact did Mr. Kolsom's statements have upon you?

MR. BROWN: Objection.

MR. MAKOWSKI: Objection.

THE COURT: He may answer.

A. Well, it did influence my decision.

Q. In what way did it influence? In favor of Mr. Pauer or against Mr. Pauer?

A. Against Mr. Pauer.

MR. HOFSTETTER: Excuse me just a moment.

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you the charge in this case. Were those questions not placed to you?

A. Yes.

Q. You didn't hesitate that you could not perform that duty did you?

A. No, I didn't.

Q. You took an oath to perform your duty as a juror in accordance with those instructions?

A. Yes.

Q. Then the Court instructed you again prior to your deliberations that your decision was to be based upon the evidence that was presented here in this courtroom, did he not?

A. Yes.

Q. Are you telling me that your decision was based on something that Mr. Kolsom said rather than the testimony and evidence and law presented to you here in the courtroom?

A. It helped to make up my mind, I think.

Q. Mr. Keim, the elements of the charge

trafficking in marijuana were detailed to you by the Court, were they not?

MR. HOFSTETTER: Objection.

THE COURT: It's overruled.

Q. --Just prior to your deliberation?

A. Yes.

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A. Yes, he asked me what--well he asked me about the trial. I forget his exact words.

Q. What was the nature of the questions about the trial that he asked.

A. He said, "What evidence did we base our facts on that we found him guilty?"

Q. Did you respond to his question?

A. Yes, I believe I did at the time.

Q. Did you talk to him about the evidence from the courtroom that you considered in rendering a verdict?

A. Yes.

Q. You also talked to him at that time about Mr. Kolsom's discussions?

A. Yes.

Q. Try to remember exactly what you told

him about Mr. Kolsom's discussions.

A. I believe I asked him if he knew Mr. Kolsom cause it bothered me in the jury room. It bothered me that he made the comment he did.

Q. Did Mr. Pauer indicate that he did know Mr. Kolsom?

A. No, he said he didn't know him.

Q. Mr. Keim, you just indicated that this statement or question by Mr. Kolsom bothered you in the jury room. Did you attempt to contact the Court or the Bailiff or anyone about your concern?

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THE COURT: That's overruled, he may answer.

A. I don't recall.

Q. When we spoke last night did I indicate --what made you think that this may be a sentencing proceeding today, Mr. Keim? What may I have said?

A. I don't know. I understood that's what you said to me, but I'm not sure.

Q. Were you willing to come voluntarily?

A. Yes.

Q. Did I offer any enducement in money or transportation expenses or anything like that?

A. No, you didn't.

Q. In fact, you had accepted very readily, did you not?

A. Yes.

Q. Why was that?

A. I guess I felt obligated, I suppose, I don't know.

Q. Now, why would you have felt obligated?

A. For my own peace of mind, I guess.

Q. Now, are you saying that you did not have peace of mind after the trial?

A. Well, I thought about it.

Q. Now, Mr. Makowski asked you the question whether you would have signed the verdict if Mr. Kolsom would not have

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Q. Had you heard the same things he was saying in evidence or was there anything--

A. You mean in the courtroom?

Q. Yes.

A. No.

THE COURT: I remember testimony to the effect that Mr. Pauer was a bricklayer.

THE WITNESS: Well, I didn't remember what he was, but that's what I had in mind, but he said that he had a name, but he had never worked. He had never been known to work, but he always had money and then he did say that's how he makes his living.

Q. And you presumed that that meant selling drugs?

A. Well, That's what I thought he meant because that's what we were discussing.

Q. Do you recollect Mr. Kolsom saying anything about the Chester Police?

A. Yes, I do remember him very vaguely mentioning--I had it Sheriff, but it could have been police.

Q. Do you remember in what--if you can't recollect, please state so, what context that came up in?

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A. I remember him saying that he had been under surveillance and he told a story about some marijuana being found and they were watching, but no one ever come to harvest it. That's all I remember.

Q. Was he referring to Dan Pauer in that at all?

A. That's what we were discussing and he told me, he told the group that he could tell us something. I said, "well, please do," and he started telling a lot of things about the past and I said, "no, no, don't talk about that because it has no bearing on this case".

Q. What did he do or say when you told him that or asked him to quit?

A. Well, he kept--when he got a chance to talk he would bring over the same thing that he was guilty and he also mentioned that some of the jurors there had children and you wouldn't want him selling the drugs to your children in school. So, he left the impression that that was Mr. Pauer's--where he made his livelihood.

Q. Was Mr. Kolsom even-tempered or even-voiced as he said these things?

MR. MAKOWSKI: Objection.

THE COURT: That's sustained.

Q. Was there any time that Mr. Kolsom directed comments directly at you during the course of the deliberations?

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asked you to come, right?

THE WITNESS: Not really.

THE COURT: Well, why?

THE WITNESS: I just wanted to sort of clear my conscience because I felt that I was the only one that thought he was innocent and it went on and on in the jury room until I just said that he was guilty and I didn't think he was. So, I just wanted to say that I still don't think he was guilty.

Q. You still, today, don't think he's guilty?

A. No.

Q. Then, let me clarify something. Earlier, either the Court or I asked you the question

would you still have signed the guilty verdict?

A. Would you please say that again.

Q. You still do not believe he's guilty?

A. No.

Q. Why then did you sign the verdict form?

A. Because they all said they wanted to talk it over.

APPENDIX A-10

Judgment Entry Denying New Trial

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

Case No.: 79 C 1044

State of Ohio, Plaintiff

-vs-

Dan Pauer, Defendant

JUDGMENT

December, 1979

JUDGE HANS R. VEIT

The defendant was convicted of trafficking in marijuana and he has argued his motion for a new trial both orally and in writing.

Shortly before the trial of the case in chief began, the prosecution advised the

defense of the names of fourteen rebuttal witnesses. The court reserved its ruling on the admissibility of their testimony. Since the defendant did not take the stand, these surprise witnesses were never called. The record is bare as to the nature of their testimony. At best, defendant's failure to testify shows fear of the unknown and lack of confidence in himself. No grounds for a new trial have been shown.

The defendant again attacks the validity of the search warrant. The court has already found the existence of probable cause for its issuance, and the defendant did not lay a foundation for an attack on the affidavit.

The State's drug expert testified that the plants and seedlings found at the defendant's home would, if permitted to grow to maturity, yield a substantial quantity of marijuana in consumable form. Such testimony was within the field of his expertise. True, the question was not asked in terms of scientific certainty (nor objected

to on these grounds), but it is not the lack of a scientific basis that would impair the probative value of such opinion evidence. It is the deduction which the expert was asked to make from the evidence to the effect that these plants would reach maturity. This was certainly a logical and probable inference. The motion for a new trial must be overruled on these grounds.

The defendant also alleges misconduct by a juror. The foreman failed to disclose on voir dire that he owned and operated a tire business in Chester Township. On voir dire and on his questionnaire, he said he was retired. This was a half truth, and it probably misled both counsel. During the deliberation of the jury, the foreman made statements to his fellow jurors to the effect that the defendant made a living by growing marijuana and by suing people and that, unless found guilty, he would sue Chester Township police department again. Evidence of such prior suit had in fact been heard at the

trial in chief. While the court does not condone the conduct of this juror, the defendant was not thereby deprived of a fair trial, and the drastic measure of setting aside the verdict on these grounds is not warranted.

The motion for a new trial is hereby overruled and judgment is entered accordingly.

Signed: HANS R. VEIT, JUDGE

cc: John F. Norton, Prosecutor

William C. Hofstetter, Esq.

APPENDIX A-11

O.R.C. Section 2925.01

(Definitions applicable to drug abuse and controlled substances law.)

As used in Chapter 2925, of the Revised Code:

(A) "Administer," "controlled substance," "dispense," "distribute," "hypodermic," "manufacture," "marihuana," "official written order," "pharmacist," "pharmacy," "practitioner," "prescription," "sale," "schedule I," "schedule II," "schedule III," "schedule IV," "schedule V," and "wholesaler" have the same meaning as provided in section 3719.01 of the Revised Code.

(B) "Drug dependent person" and "drug of abuse" have the same meaning as provided in section 3719.011 (3719.01.1) of the Revised Code.

(C) "Dangerous drug" has the same meaning as provided in section 4729.02 of the Revised Code.

(D) "Actual incarceration" means that a person is required to be imprisoned for the

stated period notwithstanding any contrary provisions for suspension of sentence, probation, shock probation, parole, and shock parole, except that a person may be transferred from an institution operated by the department of rehabilitation and correction to the custody of the department of mental health or the department of mental retardation and developmental disabilities, as provided in section 5120.17 of the Revised Code, and shall be credited with all time served in the custody of the department of mental health or department of mental retardation and developmental disabilities against the period of actual incarceration. An offender serving actual incarceration is eligible for time off for good behavior pursuant to section 2967.19 of the Revised Code if confined in a state penal institution, or pursuant to criteria established by the adult parole authority pursuant to division (E) of section 2967.01 of the Revised Code if confined in a state reforma-

tory institution, which in either case shall be calculated on a minimum term which is the period of actual incarceration.

(E) "Bulk amount" of a controlled substance means any of the following:

(1) An amount equal to or exceeding ten grams of twenty-five unit doses of of a compound, mixture, preparation, or substance which is, or which contains any amount or, a schedule I opiate or opium dirivative, or cocaine;

(2) An amount equal to or exceeding ten grams of a compound, mixture, preparation, or substance which is, or contains any amount of, raw or gum opium;

(3) An amount equal to or exceeding two hundred grams of marihuana, or an amount equal to or exceeding ten grams of the resin contained in marihuana, or of any extraction or preparation of such resin, or equal to or exceeding two grams of such resin in a liquid concentrate, liquid extract, or liquid distillate form;

(4) An amount equal to or exceeding thirty grams or ten unit doses of a compound, mixture, preparation, or substance which is, or contains any amount of, a schedule I hallucinogen other than tetrahydrocannabinol, lysergic acid diethylamide, lysergic acid amide, or marihuana;

(5) An amount equal to or exceeding twenty grams of five times the maximum daily does in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance which is, or contains any amount of, a schedule II opiate or opium dirivative;

(6) An amount equal to or exceeding one gram or ten unit doses of a compound, mixture, preparation, or substance which is, or contains any amount of, lysergic acid diethylamide, lysergic acid amide, or tetrahydrocannabinol;

(7) An amount equal to or exceeding five grams or ten unit doses of a compound, mixture, preparation, or substance which is, or contains any amount of phencyclidine;

(8) An amount equal to or exceeding one hundred twenty grams or thirty times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual of a compound, mixture, preparation, or substance which is, or contains any amount of, a schedule II stimulant or depressant substance, or a schedule III or IV substance;

(9) An amount equal to or exceeding two hundred fifty milliliters or two hundred fifty grams of a compound, misture, preparation, or substance which is, or contains any amount of, a schedule V substance.

(F) "Unit dose" means an amount or unit of a compound, mixture, or preparation containing a controlled substance, such amount or unit

being separately identifiable and in such form as to indicate that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual.

(G) "Cultivate" includes planting, watering, fertilizing, or tilling.

(H) "Drug abuse offense" means any of the following:

(1) A violation of section 2925.02, 2925.03, 2925.11, 2925.12, 2925.13, 2925.21, 2925.22, 2925.23, 2925.31, 2925.32, or 2925.36 of the Revised Code.

(2) A violation of an existing or former law of this or any other state or of the United States, substantially equivalent to any section listed in division (H)(1) of this section;

(3) An offense under an existing or former law of this or any other state, or of the United States, of which planting, cultivating, harvesting, processing, making, manufacturing, producing, ship-

ping, transporting, delivering, acquiring, possessing, storing, distributing, dispensing, selling, inducing another to use, administering to another, using, or otherwise dealing with a controlled substance is an element;

(4) A conspiracy or attempt to commit, or complicity in committing or attempting to commit any offense under division (H)(1), (2), or (3) of this section.

(I) "Felony drug abuse offense" means any drug abuse offense that would constitute a felony under the laws of this state except a violation of section 2925.11 of the Revised Code.

(J) "Harmful intoxicant" does not include beer or intoxicating liquor, but means any compound, mixture, preparation, or substance the gas, fumes, or vapor of which when inhaled can induce intoxication, excitement, giddiness, irrational behavior, depression, stupefication, paralysis, unconsciousness, asphyxiation, or other harmful physiological

effects, and includes without limitation any of the following:

(1) Any volatile organic solvent, plastic cement, model cement, fingernail polish remover, lacquer thinner, cleaning fluid, gasoline, and any other preparation containing a volatile organic solvent;

(2) Any aerosol propellant;

(3) Any fluorocarbon refrigerant;

(4) Any anesthetic gas.

(K) "Manufacture" means to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.

(L) "Possess" or "possession" means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or

occupation of the premises upon which the thing or substance is found.

(M) "Sample drug" means a drug or pharmaceutical preparation that would be hazardous to health or safety if used without the supervision of a practitioner, or a drug of abuse, and that, at one time, had been placed in a container plainly marked as a sample by the manufacturer.

(N) "Standard pharmaceutical reference manual" means the current edition, with cumulative changes if any, of any of the following reference works:

(1) "The National Formulary";

(2) "The United States Pharmacopeia", prepared by authority of the United States Pharmacopeial Convention, Inc.;

(3) Such other standard references as approved by the state board of pharmacy.

(See Tables 2-4 supra and Rev. Code § 3719.01 et seq. infra.)